SUPREME COURT, U.S.
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MICHAEL RODAK, JR.,

No. 74-243

In the Supreme Court of the United States

OCTOBER TERM, 1974

JAMES V. PACENTE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, James V. Pacente, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Opinion Below

The opinion of the Court of Appeals *en banc*, not yet reported, is reprinted herein as Appendix A, *infra*.[1]

[1] Said opinion supersedes a prior opinion by a panel of the Court of Appeals, reversing and remanding for a new trial, printed at 490 F.2d 661 (7 Cir. 1973), and reprinted herein as Appendix B, *infra*.

Jurisdiction

The judgment of the Court of Appeals *en banc* by vote of 4 to 2 was entered on August 6, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1A. May petitioner be convicted for having violated the Hobbs Act, 18 U.S.C. 1951, for alleged extortion of money from a tavern owner, where all beverages sold in the Illinois tavern were purchased from Illinois distributors and thus had come to rest and were no longer in interstate commerce when purchased by the tavern owner?

B. Does not application of the Hobbs Act to the above-stated situation constitute federal overreaching into an area wherein local rather than federal laws ought to be applied in order not to upset the delicate federal-state balance per *United States v. Enmons*, 410 U.S. 396?

2. Was there sufficient evidence to establish that the alleged extortion affected interstate commerce, where the evidence at most showed one $200 payment by the tavern owner, and there was no evidence that the tavern's orders of alcoholic beverages ceased or declined thereafter or that its business was in any manner interrupted? Moreover, did not the court direct the jury to find that commerce was affected, thus violating petitioner's right to trial by jury?

3. May petitioner's conviction for violation of the Hobbs Act stand where the trial court never instructed the jury as to the essential element of "commerce" as that term conceivably could have factually been applicable to the case at bar?

4. Did not the trial court abuse its discretion in denying petitioner's motion to sever the counts for trial and compelling petitioner to be tried jointly both upon the substan-

the Hobbs Act count and the false statement count—where the false statement count alleged that petitioner lied to the grand jury when he denied having committed the act alleged in the substantive count—since such joint trial informed the jury determining petitioner's guilt as to the substantive count that when petitioner denied said charge before the grand jury, the grand jury believed he was lying to them, and thus prejudiced petitioner in that his credibility was necessarily impeached *ab initio?*

5. Did the court commit prejudicial error by its erroneous instruction concerning the jury's consideration of the separate counts, in that said instruction failed to advise the jury to return separate verdicts upon each count?

6. Was not petitioner's constitutional right to trial by jury violated by the court's summary discharge, after deliberations had begun, of a juror whose father reportedly was critically ill?

A. Is petitioner bound by a purported stipulation pursuant to F.R.Cr.P. 23(b) to proceed with less than 12 but not less than 10 jurors, where said stipulation was signed by petitioner's counsel but not by petitioner, and where it does not appear that petitioner was present when the stipulation was made or that he participated or acquiesced therein?

B. Even if petitioner be deemed bound by said stipulation, can such stipulation cover summary discharge by the court of a juror after deliberations had begun; for does not such stipulation necessarily apply only to permit discharge of a juror and proceeding with less than 12 jurors *prior* to the case being submitted to the jury?

C. Is not the instant decision upon this issue in conflict with cases from other Circuits?

7. Did not the trial court abuse its discretion in refusing to order a new trial based on newly discovered evidence, where such evidence substantially discredited the prosecution's sole identification witness; and did not the court apply an improper standard in denying such motion?

Constitutional Provisions, Statutes and Rules Involved

Article III, Sec. 2, par. 3 of the United States Constitution provides:

> "The Trial of all Crimes . . . shall be by jury . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the assistance of counsel for his defence."

Title 18, United States Code, sec. 1951, provides in pertinent part as follows:

> "*Interference with Commerce by threats or violence*
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

Rule 14, Federal Rules of Criminal Procedure, provides in pertinent part as follows:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

Rule 23(b), Federal Rules of Criminal Procedure, provides:

> "(b) Jury of Less Than Twelve. Juries shall be of 12, but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12."

Statement of the Case

Petitioner, James V. Pacente, a Chicago police officer, was indicted in No. 72 CR 241, which charged in Count 1 that he violated the Hobbs Act, in that while a member of the Chicago, Illinois Police Department, he obstructed, delayed and affected commerce, as that term is defined in 18 U.S.C. 1951, by extortion in that he obtained $200 by inducing fear of economic harm to a tavern owner under color of official right. (App. 1-2).[2]

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[2] "App." refers to petitioner's Appendix filed in the Court of Appeals; "R." refers to the Record on Appeal; "Tr." to the Transcript of Proceedings at trial; "Supp. R." to the Supplemental Record on Appeal; and "Supp. App." to the Supplemental Appendix.

In Count 2, petitioner was charged with making a false material declaration to the Grand Jury on February 22, 1972 when he was asked whether he ever received a check dated June 10, 1971 payable to cash in the amount of $200 and signed by Stojan Kovacevic, to which question the petitioner answered, denying he received such a check; and that such false statement was in violation of 18 U.S.C. 1623. (App. 2-3).

A motion for the election of counts or for a severance of counts on the ground that a joint trial of both counts would prejudice petitioner (App. 4) was denied. A pretrial motion also was made in accordance with Rule 2.04(c) of the Local Criminal Rules that the government provide defendant with any and all documents which "indicate the duties, assignments, arrests, etc. of this defendant in or about June, 1971, specifically, but not limited to June 10, 1971." (App. 4) As a result of such motion and conferences held pursuant to Rule 2.04, the government merely turned over a copy of a check to be used by the government during trial. (R. 9)

The testimony was in sharp dispute. The single government witness who identified petitioner in court as being the person who took a check payable to "cash" in the amount of $200 on June 10, 1971, stated that petitioner was clean-shaven on said date. (Tr. 62) Petitioner and several relatives, as well as his barber, testified that petitioner had a full grown mustache on June 10, 1971 and so had it for a number of months prior to and for a period after June 10, 1971, until he entered the hospital on July 11, 1971 for hepatitis which disabled him to December, 1971. (Tr. 183-88, 193-95) In closing argument, the government attorney minimized the effect of the evidence of mustache because such evidence came from relatives and a long time barber friend. (Tr. 275).

After conviction, petitioner ascertained he was a witness in the Circuit Court of Cook County on June 17, 1971 and was able to produce the affidavit of a disinterested witness, Attorney Joseph N. Lascaro, 111 W. Washington Street, Chicago, Illinois who averred that he saw petitioner in court on June 17, 1971 in connection with the case the affiant was defending, and that at that time, petitioner had a fully grown mustache. This affidavit (R. 44) was made in support of petitioner's motion for new trial, which was denied. (R. 41)

The court sentenced petitioner to three years on Count 1 and to three years on Count 2, the sentences to run concurrently. (R. 41)

Statement of Facts

The facts are set forth in the panel's original opinion, App. B, pp. 22-23, and are not repeated herein to avoid unnecessary duplication. Specific facts will be referred to in the course of this Petition where necessary for an understanding of the arguments raised herein.

REASONS FOR GRANTING THE WRIT

1.

There was no proof that the "commerce" was of an interstate character as required by the statute. Certiorari should be allowed to determine whether the Hobbs Act, 18 U.S.C. 1951, applies to such purely local conduct, or whether such application constitutes "an unprecedented incursion into the criminal jurisdiction of the States" within the meaning of United States v. Enmons, 410 U.S. 396.

The Hobbs Anti-Racketeering Act, 18 U.S.C. 1951, makes it a crime to extort where the extortion interferes with interstate commerce, as commerce is defined in the statute. Local or intra-state commerce is without the federal jurisdiction. 18 U.S.C. 1951 (b)(3).

Thus the government had to prove that interstate commerce was involved. The facts of the case do not permit any interpretation that such commerce was involved.

As to the "commerce" aspects of the government's case, the stipulated proof[3] was that all of the liquor and beer

[3] We wish to stress that the stipulations in the case at bar did not constitute proof of the interstate commerce element of the Hobbs Act offense charged herein. It was stipulated only that if certain prospective witnesses were to testify, they would state that Chicago-Oak Liquor obtained its beer and liquor from local distributors who had purchased it from outside the state. (Supp. R. 1-3) There was no stipulation that such facts constituted interstate commerce, or that they proved that Chicago-Oak was engaged in such commerce. We ask the Court to consider the issues raised in this Petition in the light of this caveat with regard to the stipulated evidence.

purchased by the Chicago-Oak Liquor Store and sold at retail in its tavern at 5940 West Chicago Avenue, Chicago, came from local Chicago, Illinois distributors.[4] There was no proof that any beverage was delivered to the store from a distributor or manufacturer from out of Illinois. It is true that the local distributors, which sold to the Chicago-Oak Liquor Store, received *their* alcoholic beverages from out of Illinois (Supp. App. 1-3); but all such beverages had come to rest in Chicago before they were then distributed to the liquor store and tavern in question. Thus, there was no interstate commerce involved.

The alcoholic beverages had come to rest in Chicago *before* they were sold to the retail establishment. Thus, the character of the "commerce" became purely intrastate. A theft from any of the liquor distributors after it had received its liquor supplies from the out-of-state distributor, or a burglary of the Chicago-Oak Liquor store itself, would not vest jurisdiction in the federal government for

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[4] Chicago-Oak's method of obtaining its beer and liquor in this manner is required by Illinois law, for no retail liquor operator may purchase beer or liquor except from a local distributor. See Chap. 43, Secs. 115(c) and (d) and Sec. 121(e), Ill. Rev. Stat. 1971. A local retailer of liquor may not obtain an importing distributor's license, and may not sell for resale. Moreover, an importing distributor may not sell at retail. Thus, by law, the local retailer may obtain his goods *only* from Illinois distributors.

And federal law also makes it illegal for a retailer such as Kovacevic to buy liquor for resale except from a licensed wholesale dealer in liquors. See 26 U.S.C. 5117(a)(1).

purposes of prosecution of a theft from interstate commerce.[5]

In *Brown* v. *Houston*, 114 U.S. 622, this Court had to decide whether or not a particular shipment of coal was or was not "in interstate commerce" when a local tax was imposed; if the coal were in interstate commerce, it could not lawfully be subject to a local tax. The Court found that the coal was no longer in interstate commerce when the tax was imposed, because it "had come to its place of rest, for final disposal or use." Thus, the local taxation was upheld.

In *E. Ohio Gas Co.* v. *Tax Commission*, 283 U.S. 465, 470-72, this Court affirmed a decree permitting a local tax to be imposed on receipts from distribution of natural gas, since once the gas from out of state reached local distribution facilities:

> "[T]he furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce but a business of purely local concern exclusively within the jurisdiction of the State." *Id.* at 471.

The Court further held:

> "[I]nterstate commerce ends and intrastate business begins when . . [a commodity] from outside the state passes into local distribution systems for delivery to customers." *Id.* at 472.

Accordingly, the "commerce" allegedly affected in the case at bar was without federal jurisdiction.

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[5] For cases in conflict with the 7th Circuit, see the following: *Brosious* v. *Pepsi-Cola Co.*, 155 F.2d 99, 103 (3 Cir. 1946); *United States* v. *Wyatt*, 437 F.2d 1168 (7 Cir. 1971); *Schwachter* v. *United States*, 237 F.2d 640, 644 (6 Cir. 1956); *Wolf* v. *United States*, 36 F.2d 450 (7 Cir. 1929); *Davidson* v. *United States*, 61 F.2d 250 (8 Cir. 1932); *O'Kelley* v. *United States*, 116 F.2d 966, 968 (8 Cir. 1941); *Shaver* v. *United States*, 174 F.2d 618, 619 (9 Cir. 1949); *United States* v. *DeMasi*, 445 F.2d 251, 257 (2 Cir. 1971).

In *United States* v. *Enmons*, 410 U.S. 396, this Court ruled that violence during a legitimate labor dispute did not constitute a Hobbs Act violation:

> "Even if the language and history of the Act were less clear than we have found them to be, the Act could not be expanded as the Government suggests—for two related reasons. First, this being a criminal statute, *it must be strictly construed*, and any ambiguity must be resolved in favor of lenity. . . . [Citations omitted] Secondly, it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such *an unprecedented incursion into the criminal jurisdiction of the States*." *Id.* at 411. (Emphasis added.)

Mr. Justice Blackmun, joining the Court's opinion, stated:

> "This type of violence, as the Court points out, is subject to state criminal prosecution. That is where it must remain until the Congress acts otherwise in a manner far more clear than the language of the Hobbs Act." *Id.* at 412.

Similarly, the conduct here alleged to have violated the Hobbs Act should be held subject only to state criminal prosecution (official misconduct, accepting a bribe, etc.).

To the same effect, see *United States* v. *Bass*, 404 U.S. 336, cited and relied upon in *Enmons*, 410 U.S. at 411-12, where this Court stated:

> "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. *Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States.* . . . [W]e will not be quick to assume that Congress has meant to effect

> a significant change in the sensitive balance between federal and state criminal jurisdiction." 404 U.S. at 349. (Emphasis added.)

Certiorari should be granted to determine whether application of the Hobbs Act to the case at bar upsets this delicate balance.

2.

There was no proof that commerce was affected at all, and the court in effect directed the jury to find that it was affected, thus violating petitioner's right to trial by jury.

To sustain a conviction under the Hobbs Act, two essential elements must be alleged and proven:

> ". . . interference with commerce, and extortion. Both elements have to be charged. Neither is surplusage and neither can be treated as surplusage. The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference." *Stirone* v. *United States*, 361 U.S. 212, 218.

It is petitioner's position that, taking all the evidence in the light most favorable to the government, neither of these essential elements has been proven.

The statute in question was promulgated by Congress in furtherance of its power to regulate interstate and foreign commerce. Moreover, the Act itself requires that to fall within its proscription, a defendant's conduct must "obstruct, delay or affect" commerce. 18 U.S.C. Sec. 1951 (a). The verb "affect" must be read as "adversely affect"; indeed, there could be no purpose in attempting to prohibit conduct which beneficially affects commerce. Among all reported cases dealing with this section, not one can be found wherein a defendant was prosecuted for conduct affecting commerce in a positive rather than a negative manner; in each case wherein a conviction was upheld,

commerce was or was reasonably going to be adversely affected by defendant's conduct.

Accordingly, this Court stated, "In our view the legislation is directed at the protection of interstate commerce against injury from extortion. . . ." *United States* v. *Green*, 350 U.S. 415, 420. The conduct held violative of the Act in that case was defendants' attempts to obtain by threat money from their employer in the form of wages to be paid for fictitious and unwanted labor services. This Court more recently stated, in *Stirone* v. *United States*, 361 U.S. 212, 215, that the Hobbs Act:

> "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish *interference* with interstate commerce by extortion, robbery or physical violence." (Emphasis added.)

In the case at bar, taking the government's evidence as true, the evidence against petitioner substantially amounts to this: he accepted a sum of $200 which was offered by the tavern owner in exchange for agreeing not to arrest him because the tavern owner had illegally sold liquor to a minor. (Tr. 25-26).

The factual stature of the case at bar is strikingly similar to that present in *United States* v. *Critchley*, 353 F.2d 358 (3 Cir. 1965). The court there framed the issue as follows:

> "The critical issue presented on this appeal is whether the evidence adduced at the trial made out a case of violation of the Hobbs Act, as the Government says it did, or as the defendant contends, it only established his solicitation and acceptance of a bribe for his forebearing from pressing, and initiating, complaints that the employing roofers had failed to comply with job specifications in the performance of their contracts." *Id.* at 359.

The court found no obstruction, delay or effect upon commerce due to defendant's activities, and reversed. *Id.* at 362.

Similarly, in the instant case, there is a total failure to establish that the tavern owner's payment to petitioner (if in fact it was made) obstructed, delayed, affected, or otherwise interfered with interstate commerce, even assuming (but not admitting) that the business in question was engaged in interstate commerce. Thus, applying the statute to this conduct is unconstitutional as going beyond Congress' commerce power.

It is unreasonable to infer that the tavern owner's ability to transact business, including the purchasing of liquor from his local distributors, was affected in the least by a $200 payment. As a matter of fact, the *proof* was that the liquor and beer were delivered to the tavern throughout 1971 "on a regular basis"; there was no showing that sales were interrupted or lessened by even as much as one bottle. (Supp. App. 1-3).

The court instructed the jury both that the degree to which commerce was affected was irrelevant (Tr. 321), and that payment of any amount of money by the tavern owner would necessarily affect interstate commerce. (Tr. 321).[6] Giving such instruction over objection constituted

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[6] The instruction, given over objection, is as follows:

"The government need not prove that any particular shipment of liquor or alcoholic beverages from out of state to the Chicago-Oak Liquors was obstructed or delayed, it is the depletion of the resources of the business engaged in interstate commerce by extortion which permits as a reasonable inference that if the extortion is established, then the operations of the business are delayed, obstructed or affected." (Tr. 321)

prejudicial error, because the court effectively removed from the jury's consideration the question whether the evidence proved, beyond a reasonable doubt, the essential element of a harmful effect upon interstate commerce.

While the statute speaks of obstructing or interfering with interstate commerce "in any way or degree," it is clear from the cases cited above that *some amount of harm must be established.* By the combined effect of the language referred to above, the jury was directed by the court to find that commerce was in fact affected merely by the payment of a small sum of money.

Here, the jurors were told that "it is the depletion of the resources of the business engaged in interstate commerce" (Tr. 321) which permit the inference that the business was affected. Under the court's instructions, the jury was obligated to find that commerce was affected, even if the payment had been a dollar.

The jury should have been permitted to consider whether, by making a $200 payment, the tavern owner thereby became unable to make his usual and regular liquor purchases from his suppliers, and thus, that commerce was in fact affected. Absent any such evidence (and the evidence is to the contrary—that regular deliveries never were affected in 1971; Supp. App. 1-3) the jury would not be entitled to reach the conclusion that commerce was necessarily affected from the mere fact that the payment had been made. Yet the court conclusively directed them to find that it was so affected.

This amounted to a finding of fact against petitioner by the court, which is constitutionally forbidden. *Sparf & Hansen* v. *United States*, 156 U.S. 51, 105-06; *Mims* v. *United States*, 375 F.2d 135, 148 (5 Cir. 1967).

Because the element of affecting commerce is essential to conviction, because the government failed to make a prima facie showing that commerce was affected, and because this issue was effectively removed from the jury's conside ation, certiorari should be granted.

3.

The court failed properly to instruct on one of the most essential elements of the case—the definition of "commerce."

Petitioner was charged in Count 1 with violating 18 U.S.C. 1951, interfering with "commerce" by inducing fear of economic harm under color of official right. (App. 1-2).

It was incumbent upon the court properly to instruct the jury of the statutory definition of the word "commerce"; this the court failed to do.

> "In the final analysis it is not the parties who determine the charge the judge gives to the jury, the obligation rests squarely on the shoulders of the trial judge." *Williamson* v. *United States*, 332 F.2d 123, 132 (5 Cir. 1962)

And this Court has held, in *Screws* v. *United States*, 325 U.S. 91, 107:

> "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it necessary to take note of it on our own motion."

The court read to the jury only part of the statutory definition of "commerce" as contained in Sec. 1951(b)(3). And an inappropriate part, at that. The court instructed the jury only that:

". . . the term 'commerce' means all commerce between points within the same state through any place outside such state and all other commerce over which the United States has jurisdiction." (Tr. 319)[7]

But the full statutory definition of "commerce" is as follows (18 U.S.C. 1951(a)(3)):

"The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States: *all commerce between any point in a State*, Territory, Possession, or the District of Columbia *and any point outside* thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction." (Emphasis added.)

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[7] Yet the government offered its instruction No. 15 (R. 30) in correct form as follows:

The Federal statute alleged to have been violated in Count I of indictment number 72 CR 241 reads in pertinent part as follows:

"Whoever, in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce by extortion or attempts or conspires so to do or threatens any person in furtherance of a plan or purpose to do anything in violation of this section . . ."

shall be punished as provided by law.

"The term extortion means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

The term commerce means commerce within the District of Columbia, or any territory or possession of the United States: *all commerce between any point in a state, territory, possession or the District of Columbia, and any point outside thereof;* all commerce between points within the same state through any place outside such state, and all other commerce over which the United States has jurisdiction." (Emphasis added.)

This was the instruction which the Court agreed to, but did not in fact, give. (Tr. 252) (Conference on Instructions).

For reasons inexplicable, the court omitted the second clause of the statutory definition:

> "[A]ll commerce between any point in a State . . . and any point outside thereof;"[8]

Had the jury been given this necessary and appropriate instruction, it is more than likely—considering the stipulated evidence that the items received by the Chicago-Oak Liquors came from Chicago distributors—that it would have found petitioner not guilty, for the evidence was clear that Chicago-Oak Liquors, a Chicago retail outlet, purchased only from wholesale distributors whose locations were in Chicago (see stipulation, Supp. R. 1-3).

The jury must have been in a heightened state of confusion when the judge instructed that commerce meant "all commerce between points within the same State through any place outside such State," because there were two points within Illinois through which the liquor and beer moved: from the wholesale liquor distributors in Chicago to the Chicago-Oak Liquors on Chicago Avenue, in Chicago.

But the factual situation in the case at bar did not permit the application of such definition as the court read. The *only* appropriate definition was the second clause of Sec. 1951(b)(3) to the effect that "commerce" means, ". . . all commerce between any point in a State . . . and any point outside thereof." Yet this definition was not included in the court's instructions.

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[8] Clearly whether the omission was intentional or inadvertent is irrelevant. It is the effect upon the fairness of petitioner's trial, not the judge's state of mind, which renders omission of this essential instruction reversible error.

The evidence showed that the beer and liquor came from out of Illinois, not directly to the Chicago-Oak Liquor Store, but to various liquor distributing companies first. This is a requirement of the laws of Illinois. No retail liquor operator may purchase any beer or liquor except from a local distributor.[9]

Thus, as between the Chicago-Oak Liquor Store and the local liquor distributors, the transactions between them were purely intra-state transactions, and not interstate at all. Not all commerce comes within the aegis of the Hobbs Act; for . . . " 'commerce' means commerce . . . between any point in a State, . . . *and* any point outside thereof . . ." 18 U.S.C. 1951(b)(3). (Emphasis added.)

Thus, when the court neglected to instruct as to the appropriate definition of commerce, the jury was left without an appropriate standard to determine whether the commerce was purely intrastate (as the evidence demonstrated it was) or interstate, in accordance with the statutory definition. It was clear from the stipulation that the beer and liquor had come to rest in Illinois before it was further distributed to local retail users. If a burglary had occurred at the Chicago-Oak Liquor Store and whiskey had been taken, the perpetrator could not have been charged with theft from interstate commerce; the merchandise had come to rest. See Points 1 and 2, *supra.*

As a matter of fact, if the truck which was delivering the beer and whiskey from the local Chicago distributor to the liquor store and tavern were hijacked, no federal prosecution could ensue. *Cf.* cases cited in footnote 5, p. 10, *supra.*

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[9] See footnote 4, p. 9, *supra.*

Accordingly, the jury could have found petitioner not guilty if it had properly been instructed on this essential element.

And certainly the jury must have been perplexed when the court erroneously instructed the jury:

> "The government need not prove that any particular shipment of liquor or alcoholic beverages from out of state to the Chicago-Oak Liquors was obstructed or delayed. . . ." (Tr. 321)

The court may not invade the province of the jury by telling them that liquor went from out of State to the liquor store; especially when the stipulated facts are to the contrary. (Supp. App. 1-3).

> "An instruction deciding a material fact issue as a matter of law adversely to the accused is regarded as a partial instructed verdict of guilty prohibited by the rule just stated." *Mims* v. *United States*, 375 F.2d 135, 148 (5 Cir. 1967).

Accord: *Sparf & Hansen* v. *United States*, 156 U.S. 51, 105-06; *United States* v. *Skinner*, 437 F.2d 164 (5 Cir. 1971); *United States* v. *Raub*, 177 F.2d 312, 316 (7 Cir. 1949); *United States* v. *Gollin*, 166 F.2d 123 (3 Cir. 1948).

In *United States* v. *Gollin*, *supra*, defendant's conviction for theft from an interstate shipment was reversed because the trial court had directed the jury to find that the truck was in interstate commerce, an element of the offense. The Third Circuit stated:

> "[W]e cannot uphold the trial court in directing the jury to accept as facts the testimony in question. That action really brought about a partial direction of verdict against these defendants in this criminal trial and on an indispensable part of the proofs." *Id.* at 126.

We submit that if there were no other error than the failure to instruct properly on the most essential jurisdictional element of the case, the conviction should be reversed.

Certiorari should be allowed so that this Court may reiterate both the necessity of instructing on all essential elements of the offense and the prohibition against a partial directed verdict against the accused.

4.

The trial court abused its discretion in denying petitioner's motion to sever the counts for trial and compelling petitioner to be tried jointly both upon the substantive Hobbs Act count and the false statement count—where the false statement count alleged that petitioner lied to the grand jury when he denied having committed the act alleged in the substantive count—since such joint trial informed the jury determining petitioner's guilt as to the substantive count that when petitioner denied said charge before the grand jury, the grand jury believed he was lying to them; and thus prejudiced petitioner in that his credibility was necessarily impeached ab initio. In view of the continuing and increasing use by the government of such technique—i.e., summoning a potential defendant before a grand jury, and, upon his denial of having committed an offense, indicting and trying him both for the offense and for the false statement to the grand jury—certiorari should be granted to consider the propriety of trying the substantive and false statement counts at a single trial.

Count I charged petitioner with a violation of the Hobbs Act, in that he extorted the sum of $200 in the form of a check dated June 10, 1971 which extortion obstructed, delayed and affected commerce, as defined in 18 U.S.C. 1951. (App. 1-2)

Count II alleged that on February 22, 1972, petitioner committed a different crime—that of making a false material declaration to the Grand Jury on February 22, 1972 in that he lied to the Grand Jury when he denied that he ever received a check dated June 10, 1971 in the amount of $200 made out by Stojan Kovacevic, in violation of 18 U.S.C. 1623. (App. 2-3)

In a pretrial motion, petitioner moved that the government elect upon which count to proceed, or for a severance of the counts on the ground that a joint trial of both counts would prejudice his right to a fair trial. (App. 4).

Rule 14 of the F.R.Cr.P. provides:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses . . . in an indictment . . . or by such joinder for trial together, the court may order an election or separate trials of counts . . . or provide whatever other relief justice requires."

Petitioner was entitled to have the jury decide his guilt or innocence upon the Hobbs Act charge (Count I) without their contamination by exposure to evidence relating to the false statement charge against him (Count II). Moreover, he was entitled to be tried on Count I by a jury that was not cognizant that a grand jury had seen fit to indict him for lying on the basis of grand jury testimony denying one of the factual allegations—to wit, having received the check from the tavern owner—necessary to prove the Hobbs Act charge.

In other words, by trying Counts I and II together, the jury was undeniably informed that, when in a grand jury proceeding petitioner denied having committed the Hobbs Act violation, the grand jurors believed he was lying, and such belief was so strong that they indicted him for perjury on the basis of his testimony. Such awareness by the

trial jury must necessarily irreparably have damaged petitioner concerning Count I, particularly in that the jury would tend to disbelieve him when he took the stand and denied the allegations of Count I. After all, the grand jury had already determined that when he denied those allegations before them, he was lying.

It is true that in the instant case the jury was instructed that evidence relating to each count was to be considered as to that count only and not as to any other count. (Tr. 326).[10] However, as pointed out above, the jury could not help being aware that the alleged lying charged in Count II involved petitioner's denial of his having committed an act essential to his conviction upon Count I. We do not believe that this Court would be so naive as to assume that, under these peculiar circumstances, the jury could reasonably have been expected to be able to put this out of its collective mind. It is impossible to assert that the jury, no matter how well-intentioned, could have kept from considering, in its determination of petitioner's guilt or innocence upon Count I, the fact that he had also been indicted on Count II for lying in connection with having denied an element of the Count I offense—in other words, that the grand jury believed he lied when denying it.

The evidence upon the false declaration charge was not admissible against petitioner as to the Hobbs Act offense, and the jury was so instructed. Yet, the jury heard the evidence regarding the false declaration and the Hobbs Act charge as part and parcel of the same trial.

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[10] But see Point 5, *infra*, as to the erroneous instruction in this regard.

It is one thing for a jury to be able to *comprehend* limiting instructions in a simple, one-defendant, two-count case; it is wholly another thing for them to be capable—psychologically, as human beings—of *following* such instructions by effectively being able to disregard that the grand jurors believed petitioner lied to them when he denied having committed the substantive offense. This simple and human principle constitutes the underpinning of the panel's original opinion in the case at bar. (See App. B.)

While "Our theory of trial relies upon the ability of a jury to follow instructions," *Opper* v. *United States*, 348 U.S. 84, 95-96, our theory of appeal recognizes that such reliance is not always absolute, because such ability is not always capable of being exercised. See *Bruton* v. *United States*, 391 U.S. 123; *Krulewitch* v. *United States*, 336 U.S. 440, 453.

We are not saying the jury was confused. We are saying they were *not* confused at all; they were acting as predictably as the government hoped they would in jointly indicting and trying petitioner; they acted as human beings, upon the realization that petitioner was affirmatively disbelieved by the grand jury.

Petitioner was impeached from the outset. We submit this could not be cured by limiting instructions, and so the panel concluded, reversing and remanding for this reason. (See App. B.)

The panel clearly acknowledged this difference between a jury's understanding limiting instructions and not being confused on the one hand, and on the other hand, being able, as a practical matter, to carry out such instructions and disregard the matter they are instructed to disregard. (App. B, pp. 29-31)

In the original opinion in the case at bar, reprinted as Appendix B, *infra*, the panel agreed with the foregoing argument and reversed and remanded for a new trial. Petitioner hereby adopts and incorporates by reference herein that portion of the panel's opinion holding that denial of severance constituted an abuse of discretion under the circumstances of this case. (App. B, pp. 25-31) Upon the government's suggestion for rehearing *en banc*, the full court overturned the panel's decision and affirmed. (App. A)

The court reversed in *United States* v. *Quinn*, 365 F.2d 256 (7 Cir. 1966), for lack of severance between counts charging the defendant with separate banking-law violations in different months.[11]

In reversing *Quinn*, the court stated, *id.* at 267:

> "In the alternative, we hold that even though there was no misjoinder of counts, defendant was greatly prejudiced by the denial of his motion for severance and that the court's refusal to allow such severance was an abuse of discretion."

Cf. Drew v. *United States*, 331 F.2d 85, 89 (D.C. Cir. 1964), cited with approval in *Quinn*.

* * *

The interrogation of petitioner before the grand jury which gave rise to the perjury charge constituted an endeavor by the government either to impair possible defenses to the Hobbs Act charge or to secure discovery from the putative defendant; indeed, one is hard put to imagine any interpretation of the situation which would permit characterization of the inquisition as a legitimate quest for

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[11] In the case at bar, the *different* alleged violations were charged as having occurred in different years: Count 1, in June, 1971, and Count 2, in February, 1972.

information.[12] The prosecution should not be permitted to profit from such improprieties. See *United States* v. *Doe*, 455 F.2d 1270 (1 Cir. 1970); *In re Russo*, 448 F.2d 369 (9 Cir. 1971); *United States* v. *Dardi*, 330 F.2d 316 (2 Cir. 1964).

At least in the Northern District of Illinois, joint indictment and trial upon substantive and false statement charges is the rule, rather than the exception. In its investigation and prosecution of so-called "official corruption" cases involving alleged criminal conduct of police officers, politicians and the like, the United States Attorneys office for this District commonly summons the potential defendant before the grand jury—though sufficient evidence without summoning him exists to indict—and then indicts and tries him upon both the substantive and false statement charges if he testifies before the grand jury denying the facts of the substantive offense.

Certiorari should be granted so this Court may consider the propriety of such tactics and determine whether joint

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[12] Nor was petitioner's choice a simple one. When summoned before the grand jury, petitioner could confess to the accusations of extortion and preclude any possible defense at trial; deny the charges and stand trial under the onus of the grand jury's characterization as "perjury" of the very testimony, the acceptance of which by the trial jury is indispensible to acquittal; or refuse to testify, and stand trial only on the Hobbs Act charge, but under the onus of suspension from the police force. Petitioner submits that appearing at trial as a suspended police officer similarly would prejudice him *ab initio* before the trial jury. See App. B, p. 27.

At the time he appeared before the grand jury, claiming one's Fifth Amendment privilege against self-incrimination when called to testify before a grand jury constituted grounds for automatic suspension from one's position as a Chicago police officer. Rules & Regulations of the Chicago Police Department, Rule 51. While this Rule was subsequently held unconstitutional in *Confederation of Police* v. *Conlisk*, 489 F.2d 891 (7 Cir. 1973), it was in full force and effect when petitioner was called to the grand jury.

trial upon both the substantive and false statement charges is inherently prejudicial for the reasons hereinabove stated.

Joinder of the Hobbs Act and false statement charges for trial was prejudicial to petitioner under the facts of the case at bar; therefore, severance should have been granted pursuant to Rule 14. In the instant case, compelling petitioner to go to trial on both charges simultaneously was an abuse of the trial court's discretion.

5.

The court erroneously instructed the jury in the manner of considering the two separate counts.

As to the manner by which the jury should consider the counts, the court instructed:

> "Now, there are two counts in this indictment, and, as I have told you, each one charges a separate crime. You should consider each one separately. The defendant's guilt or innocence of the crime charged in one count should not affect your verdict on the other count and if you find the defendant guilty beyond a reasonable doubt of either of the crimes charged in the indictment, then a verdict of guilty should be returned." (Tr. 326).[13]

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[13] The instruction given by the court is different from the proper instruction submitted by the government in the instruction conference. LaBuy, Jury Instructions in Federal Criminal Cases, Sec. 7.03, at 78 (1965). The second sentence of the government's proposed instruction No. 32 (R. 30) reads: "Each crime and the evidence pertaining to it should be considered separately by the jury, *and a separate verdict should be returned as to each count.*" (Emphasis added.)

The italicized portion was omitted when the court instructed the jury.

And in the bound Record, at p. 30, where the submitted instructions are included, the words in government instruction No. 32, "and a separate verdict should be returned as to each count." are interlineated.

The instruction is prejudicially erroneous because it authorizes the jury to find petitioner guilty generally if they believe he is guilty of either of the two crimes charged.

We submit that the portion of the instruction permitting such general verdict, rather than specifically directing the jury that it must return separate verdicts of guilty or not guilty on each of the two separate counts, is error.

In *United States* v. *DiMatteo*, 169 F.2d 798, 800-01 (3 Cir. 1948), the court reversed, stating:

> "*The charge of the learned judge was insufficient in that he did not direct the jury to return a verdict on each count of the indictment.* . . . The desirability and even the necessity of requiring a jury to return a separate verdict on each count of an indictment was dealt with by this court in United States v. Crescent-Kelvan Co., 3 Cir., 164 F. 2d 582, 589. In the opinion in that case we said that '* * * where there are separate counts in an indictment or information, there must be separate verdicts by the jury, under proper instructions from the court, as to the guilt or innocence of * * * [the] defendant on each count if a judgment of conviction is to stand . . .' *Obviously in every case where there are two or more counts in an indictment, proper practice will require the jury to render a separate verdict on each count.*" (Emphasis added.)

And in *United States* v. *Agueci*, 310 F.2d 817, 829 (2 Cir. 1962), the court stated that the trial judge "has the burden of impressing upon the jury the need for judging each defendant separately upon each separate substantive count charged in the indictment."

Since the noted portion of the instruction in the case at bar authorizes a general verdict of guilty upon proof of guilt of either of the two counts, the principles enunciated in the above cases teach that such instruction is faulty and prejudicially erroneous.

Moreover, the instruction is bad for the additional reason that it required a guilty finding on both counts, even if the jury concluded defendant was not guilty as to one count.

In the exercise of its supervisory power over the lower federal courts, this Court should grant certiorari to express the requirement that the trial court must direct the jury to return separate verdicts upon separate counts; and for the prejudicial error herein, petitioner should be afforded a new trial.

6.

Petitioner's constitutional right to trial by jury was violated by the court's summary discharge, after deliberations had begun, of a juror whose father reportedly was critically ill. Petitioner cannot be deemed bound by a purported stipulation, pursuant to F.R.Cr.P. 23(b), to proceed with less than 12 but not less than 10 jurors, where said stipulation was signed by petitioner's counsel but not by petitioner, and where it does not appear that petitioner was present when the stipulation was entered into or that he participated or acquiesced therein. Patton v. United States, 281 U.S. 276. Moreover, even if petitioner be deemed bound by said stipulation, it does not cover summary discharge of a juror by the court *after* deliberations had begun, for the stipulation necessarily applies only to permit discharge of a juror and proceeding with less than 12 jurors *prior* to the case being submitted to the jury. The instant decision upon this issue by the Seventh Circuit is in conflict with cases from other Circuits; certiorari should be allowed so that this conflict may be resolved and so that this Court may definitively express itself with respect to stipulations pursuant to F.R.Cr.P. 23(b), in light of the requirements of Patton v. United States.

After 12 jurors were selected on October 10, 1972, the attorneys stipulated as follows:

> "It is hereby stipulated by and between the parties hereto by their respective attorneys that in case one but not more than two jurors shall be excused from the panel by reason of illness or for any other good cause as determined by the court, that the trial may proceed before the remaining members of the panel with the full force and effect as if the full panel were present." (R. 25).

The stipulation was signed only by counsel for the respective parties. (R. 25)

Although the stipulation was in writing as required by F.R.Cr.P. 23(b) nothing in the stipulation or in any colloquy in open court shows actual acquiescence by petitioner himself, or even that he was present.

The 12 jurors originally selected heard all of the evidence, were instructed, and deliberated upon their verdict on October 11, 1972. Sometime in the evening of October 11, 1972 the 12 jurors were provided with supper. (See order, R. 37) Sometime later, on October 11, 1972, the court entered an order excusing juror Viola Woodson. (R. 34) The court did this without any consultation with counsel for petitioner. This was made known to defense counsel on October 12, 1972, during the morning proceedings. [14]

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[14] The following occurred:

"The Court: Yes. The Marshall has reported to me that the jury was deliberating until approximately 11:00 o'clock last night and he also reported to me by telephone that one of the juror's father was seriously ill and in the hospital and not expected to live and that report came to us, from the juror's husband, and, having heard that, and pursuant to the stipulation that you gentlemen entered into, that juror has been excused. So we have 11 jurors that are now deliberating.

Mr. Genson [defense attorney]: Your Honor, relative to that, and I understand that case law and I am not quoting any

First, we point out that the stipulation whereby no alternate jurors were selected merely was an agreement to continue the *trial*—and nothing else. If there were no stipulation and alternates had been selected, those alternates would be discharged at the time when the regular panel of 12 commenced its jury deliberations,[15] and, accordingly, if a juror were excused during deliberations, for any reason, a mistrial would have occurred. It was not contemplated by defense counsel that a juror may be excused during *deliberations*. Certainly, the stipulation is unclear.

Secondly, the cause for which the court stated it excused the juror is not "good cause." Apparently, some communication was received by the Marshal by telephone from juror Woodson's husband that the juror's father was seriously ill and not expected to live. That communication was reported to the court by telephone, whereupon the court excused the juror. As soon as counsel was able

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(Footnote continued)

cases, but I think that, notwithstanding the stipulation, that I should have been notified or been present at the time of the excuse—I understand what your Honor did, but I will object for the record.

The Court: Well, if you wanted to be here at 11:00 o'clock last night and to be called out of bed, or wherever you were at 11:00 o'clock, why, I suppose you could have been called, but I don't think that it would have made a bit of difference. I mean —however, I will let you make your objection. I certainly saw no alternative under the circumstances except to excuse the juror. And I would have excused her over your objection. But the record will show that." (Tr. 333-34)

[15] Pursuant to the mandatory directive of F.R.Cr.P. 24(c), which provides in pertinent part: "An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict."

to make his objection upon being notified of the excusal, he voiced his objection while the jury was yet deliberating. (Tr. 333) At the very least, some verification of the communication should have been made.

Rule 23(b), F.R.Cr.P. provides that:

> "Juries shall be of 12, but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12."

While a defendant in a federal criminal case is entitled by the Constitution and by statute to a jury of 12 persons, this right may be waived, but only in strict accordance with the provisions of Rule 23(b). See *Beatty* v. *United States*, 377 F.2d 181, 185 (5 Cir. 1967) (rev'd on other grounds, per curiam, 389 U.S. 45).

The instant decision by the Seventh Circuit is directly in conflict with *United States* v. *Guerrero-Peralta*, 446 F.2d 876 (9 Cir. 1971), where the court reversed since there was no proof of defendant's knowing and intelligent express consent to her counsel's oral stipulation to proceed with 11 jurors, holding:

> "The government argues that the defendant's express consent need not appear in the record; that it is enough if both counsel agree to the oral stipulation, the court approves it, and the defendant is present and remains silent. . . . We think that this goes too far. Rule 23(b) is 'a mandatory requirement.' . . . The purpose of a written stipulation under Rule 23(b) is to provide 'the best record evidence of the *express* consent of a defendant.' . . . Express consent given orally by the defendant personally and appearing on the record may be equally good evidence, but that much, as a minimum, must appear. An assertion by defense counsel that the defendant has consented is less reliable evidence, even when coupled with the inference of

> acquiescence drawn from defendant's failure to protest. Such an assertion is insufficient to show that the defendant's consent, if indeed it was given, was given with the requisite degree of understanding." *Id.* at 877.

The court further held: "[I]t must appear from the record that the defendant personally gave express consent in open court, intelligently and knowingly, to the stipulation." *Ibid.*

The instant decision is also in conflict with those cases affiirming because defendant's inteiligent and knowledgeable consent to the stipulation *was* evident from the record, and specifically holding that such consent is necessary before the stipulation to proceed with a jury of less than 12 may constitutionally be deemed binding upon the defendant. See, *e.g.*, *United States* v. *Ricks*, 475 F.2d 1326 (D.C. Cir. 1973) (personal agreement with counsel's stipulation by defendant—through his own voice—in colloquy with court); *accord*, *Horne* v. *United States*, 264 F.2d 40, 42 (5 Cir. 1959); *United States* v. *Lane*, 479 F.2d 1134 (6 Cir. 1973).

The stipulation here was signed by counsel for petitioner and the government. There was no express consent by petitioner in any form. Compare the evidentiary stipulations which were signed by counsel *and* petitioner. (Supp. App. 1-3) The court discharged the juror in question without notice to counsel based on a phone call from the juror's husband to the Marshal stating that the juror's father was critically ill.

1. *The stipulation is null and void.*

Because petitioner did not participate in the stipulation in any manner, it can not operate as binding upon him. *United States* v. *Guerrero-Peralta*, 446 F.2d 876 (9 Cir. 1971). (See quotation therefrom, *supra;* pp. 32-33.)

Rule 23(b) specifically provides that a stipulation to proceed with less than 12 jurors may be made "by the parties." Petitioner is without question a party to the cause. Moreover, since such a stipulation amounts to partial waiver of the constitutional right to trial by jury, defense counsel alone has no power to bind petitioner thereby; right to trial by jury can never be waived by counsel without the knowing acquiescence, at the very least, of the defendant. *Ibid.*

According to the comments of the Advisory Committee on the Rules, 18 U.S.C.A. Rule 23, at 164 (1969), subsection (b), providing for juries of less than 12, "is a restatement of existing practice, the constitutionality of which was approved in *Patton* v. *United States*, . . . 281 U.S. 276 . . . " In *Patton*, this Court construed waiver of a 12-person jury to be essentially identical to waiver of jury trial per se, and deemed the same test applicable to ascertain the validity of such partial waiver. The Court held:

> "[W]e must reject in limine the distinction sought to be made between the effect of a complete waiver of a jury and consent to be tried by a less number than 12, and must treat both forms of waiver as in substance amounting to the same thing." 281 U.S. at 312.

Accordingly, this Court held that for consent to be tried by less than 12 jurors to be effective, it must be "express and intelligent" consent. *Ibid.* See also 8 MOORE'S FEDERAL PRACTICE, *Criminal Rules*, ¶23.04, at p. 23-12 n.9 (2d ed. 1974.)

Compare the instant case with *Rogers* v. *United States*, 319 F.2d 5 (7 Cir. 1963), where defendant on the record expressly agreed not only to a stipulation substantially the same as here, but also to the discharge of the particular

juror in question. *Accord, Horne* v. *United States*, 264 F. 2d 40, 42 (5 Cir. 1959). In the case at bar, petitioner never expressed any position as to the purported stipulation, and had no opportunity to accept or object to the court's discharge of the particular juror, since the court acted without notice to his counsel.

2. *The factual situation in the case at bar was not covered by the stipulation, even assuming its validity for the sake of argument.*

The stipulation did not encompass the discharge of a juror after deliberations had begun. By its terms, the stipulation covered incapacity and discharge of a juror during trial. While in common parlance "trial" may be construed to cover every step from commencement of the proceedings to and including sentencing, we submit that where the term "trial" is used in a document specifically relating to a jury, its connotation is "trial" as opposed to "deliberations." Moreover, since discharge of a regular juror and substitution of an alternate is specifically limited to points in time *prior* to when the jury retires to begin its deliberations, Rule 24(c), F.R.Cr.P.,[16] similarly the beginning of deliberations should be construed as that point in time after which no juror may properly be discharged, no matter what the reason. The stipulation should not be construed as permitting in essence what Rule 24(c) forbids.

The Committee Comments to Rule 23(b), *supra*, support this position, to the effect that the rule is applicable "in case it becomes necessary during the trial to excuse a juror . . . and no alternate juror is available." Since an alter-

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[16] See note 15, p. 31, *supra*.

nate cannot be utilized once deliberations have begun, F.R. Cr.P. 24(c), these Comments to Rule 23(b) imply that discharge of a juror pursuant to a Rule 23(b) stipulation is similarly limited.

Moreover, the Comments further note that a Rule 23(b) stipulation may consent "that the case *be submitted* to less than 12 jurors." (Emphasis added.) This, too, strongly implies that such stipulation applies only *prior to submission* of the case to the jury for deliberation. See also 8 Moore, *supra*, ¶¶23.01[2] & 23.04, at pp. 23-11 & -12.

Hence, both because of the language of the stipulation itself and the obvious intent of Rule 23(b) as evidenced by the Committee Comments, even if the stipulation be deemed binding upon petitioner, it did not permit removal of a juror after deliberations had once begun. Such removal therefore unconstitutionally abridged his right to trial by jury.

3. *Petitioner's right to trial by jury was violated by proceeding to verdict with 11 jurors after the 12th had participated in some of the deliberations, but not in the verdict.*

Even if the stipulation is deemed binding, its application to the facts here operated to deprive petitioner of his constitutional right to trial by jury; he was convicted by 11 jurors who had participated in deliberations with a 12th who did not participate in the verdict. Thus, it is possible that the verdict of the 11 may have been influenced by words or conduct of the subsequently discharged juror. Thus, even if the stipulation be valid, and petitioner be deemed to have agreed to a verdict of less than 12 jurors, he never agreed to abide by a verdict of 11 after the 12th had once participated in deliberations, and thus stands

convicted possibly on the basis of participation by a person who did not concur in the verdict. Moreover, since this 12th person may have contributed to the verdict, petitioner's rights were violated by his inability to include her in his post-verdict poll of the jury (Tr. 337), in violation of his constitutional rights, since the right to poll the jury is part and parcel of the right to trial by jury.

An analogous situation is found in *United States* v. *Virginia Erection Corp.*, 335 F.2d 868 (4 Cir. 1964), where the court reversed and remanded because the trial court permitted an alternate juror to be present during deliberations because of the anticipated imminent incapacity of a regular juror which was known to the court before deliberations began. The reviewing court held that even though the trial judge had admonished the alternate not to participate in the deliberations and to say nothing unless one of the regular jurors was discharged (*id.* at 870), and even if the alternate had heeded the court's instructions, it was possible "that his attitude, conveyed by facial expressions, gestures or the like, may have had some effect upon the decision of one or more jurors." *Id.* at 872. In the case at bar, of course, the subsequently discharged juror had not been so admonished, and it is to be expected that she actively participated in deliberation up until the moment she was discharged. The fact remains that a person who did not concur in the ultimate verdict participated in the deliberations, may have influenced the others, and was not available to be polled. *Cf. United States* v. *Allison*, 481 F.2d 468 (5 Cir. 1973) (remanded for rehearing to determine whether alternate juror present during deliberations may have affected verdict).

4. *Petitioner's right to counsel was violated since the court discharged the juror without notice to counsel.*

Clearly petitioner has a constitutional right to be represented by counsel at all stages of the proceedings, and clearly the making of a judicial decision to discharge a juror pursuant to the purported stipulation was a "stage of the proceedings" at which petitioner had a right to be represented. Here, no notice at all was given to petitioner or his counsel.

Nothing but the bare conclusion of one representing himself to be the juror's husband in a telephone conversation to a U.S. Marshal as to the juror's father's ill health supports the court's discharge of the juror. Had notice been given to the defense, counsel could at least have verified whether the juror's father's condition was as serious as portrayed by the juror's husband. In any event, the stipulation, by stating that a juror could be discharged for "good cause as determined by the court," contemplated a judicial proceeding, subject to hearing evidence and argument of counsel, at which such determination might be made. For the court to act on a layman's phone call to the Marshal without notice to counsel, and without anything substantiated of record to indicate any real possibility of the imminent death of the juror's father, violated the clear meaning of the stipulation as well as petitioner's right to counsel.

In the only discovered case wherein a court was upheld in discharging a juror for illness of someone other than the juror herself without notice to counsel, the facts were quite different from the case at bar. In *United States* v. *Houlihan*, 332 F.2d 8 (2 Cir. 1964), the juror, a practical

nurse, *personally* appeared before the judge and advised him that her patient had suffered heart damage the preceding day and would remain alone at his home unless she were discharged. The court discharged her without prior notice to counsel, and was upheld by the reviewing court in so doing. In that case, however, the nurse *personally* advised the court of the seriousness of her patient's condition and the necessity of her being with him, and she was excused after the jury was sworn, but *before* any evidence had been taken. That is quite different from the pure hearsay in the case at bar.

* * *

For any or all of the foregoing reasons, petitioner's constitutional right to jury trial was violated. Because of the conflict between the instant decision and decisions concerning Rule 23(b) from the Fifth, Sixth, Ninth, and District of Columbia Circuits,[17] certiorari should be granted so that this Court may resolve said conflict and definitively construe Rule 23(b) for the guidance of the lower federal courts and the protection of the accused's constitutional right to jury trial. Moreover, since it does not appear that this Court has had occasion to consider such questions since its pre-Rule decision in *Patton* v. *United States*, 281 U.S. 276, it would be appropriate to grant certiorari in order to reaffirm that holding and apply its doctrine specifically to Rule 23(b) situations.

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[17] See pp. *32-33, supra.*

7.

The trial court abused its discretion and committed prejudicial error in refusing to order a new trial based on newly discovered evidence, where such evidence substantially discredited the prosecution's sole identification witness; moreover, the court applied an improper standard in ruling on the motion in light of In re Winship, 397 U.S. 358.

After conviction on October 12, 1972, petitioner filed, on October 19, 1972, his Motion for New Trial Based on Newly Discovered Evidence. The motion and supporting affidavits demonstrate that petitioner did not know —could not have known—that the sole government identifying witness would state that petitioner was clean-shaven when the witness Kovacevic allegedly saw petitioner in his tavern on June 10, 1971.

The motion and petitioner's affidavit (R. 44) set out that in the work assignment sheets furnished the defense by the U.S. Attorney, nothing therein reflected that petitioner attended any court hearings in the month of June, 1971.[18] Petitioner's affidavit further set out that on Friday, October 13, 1972 (one day after his conviction) petitioner examined documents at the Austin Avenue police station which reflected that he had been present in one of the courts on June 17, 1971. (R. 44).

The motion for new trial set out the supporting affidavit of Attorney Joseph L. Lascaro, 111 W. Washington Street, Chicago, which reflects that he was present in court

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[18] Pursuant to pre-trial order, the government was to furnish all such documents to petitioner. See p. 6, *supra*. He thus was entitled to rely on the information so furnished; yet, as is evident from the subsequent developments, such information was incomplete.

representing one, William Vance, who was charged with a violation of Illinois laws upon the complaint of officer James Pacente; that the attorney saw James Pacente in court in Chicago on June 17, 1971 and that at that time Pacente had a fully grown mustache, and that if requested, he would so testify in the case at bar. Additional support for the motion is the certified copy of the transcript of proceedings in the case of *People* v. *William J. Vance,* Criminal No. 71 MC1-430253, showing that Vance was a defendant in court on June 17, 1971 and further showing the petition of Vance before the chief judge of the Criminal Division of the Circuit Court of Cook County seeking to expunge his record of arrest and setting out on August 19, 1971 that Vance went to trial on June 17, 1971 and was discharged in court, which petition further released from any liability the arresting police officer, James Pacente. (R. 44).

Inasmuch as the sole factual dispute in the trial was the identification of petitioner by government witness Stojan Kovacevic, and inasmuch as the government attorney argued to the jury that petitioner's relatives and barber should not be believed when they testified petitioner had a fully grown mustache in June, 1971, because they were relatives and friend, (Tr. 275) the testimony of Attorney Joseph L. Lascaro was certainly material and most likely would have been persuasive in acquitting petitioner, inasmuch as the jury had deliberated on October 11, 1972 until the hour of 11:00 p.m. (Tr. 333), and further deliberated for several hours on the morning of October 12, 1972 (Tr. 43), thus demonstrating that the contested issue of identification was not easily resolved by the jury.

The case against petitioner was by no means strong. Kovacevic had testified that the man he identified as Pacente had gone into his place of business once prior to June 10, 1971, in April, 1971 (Tr. 18-20); and further that the police officer had told him his name was Pacente. (Tr. 21) Yet both FBI agent Brown (Tr. 170) and Dallman (Tr. 175) testified that when they interviewed Kovacevic, he did not give them the name of Pacente as the person who received the $200 check on June 10, 1971.

Kovacevic had testified that the man to whom he had given the check was clean shaven. (Tr. 62). Thus, if a disinterested party, not related to or a long time friend of petitioner could testify that petitioner had a fully grown mustache on June 17, 1971—as Attorney Lascaro could, and was willing so to do—the prosecution's argument to the jury might not have been so persuasive. The jury might reasonably have found that Kovacevic was mistaken when he identified petitioner as the person to whom he gave the check.

Although the general rule is that a motion for new trial will not be granted where the newly discovered evidence is "merely cumulative or impeaching," *Mesarosh* v. *United States*, 352 U.S.; *United States* v. *Rutkin*, 208 F.2d 647, 649 (3 Cir. 1963), the test must be viewed, not in the abstract, but as it has actually been applied by the courts.

As applied in the better-reasoned decisions, the test is: If the evidence is newly discovered, a new trial should be allowed if it is likely that a jury hearing the newly discovered evidence might have a reasonable doubt as to defendant's guilt, even if the thrust of the newly discovered evidence is impeaching in character.

In *Mesarosh* v. *United States*, 352 U.S. 1, this Court ordered a new trial where the credibility of one government witness (of a total of seven who had testified against defendant) was wholly discredited by subsequent events involving his having perjured himself at subsequent trials. The outcome would very likely be affected had the jury known how lacking in credibility this witness was; hence, a new trial was in order, even though the newly discovered evidence went only to credibility.

Many cases recognize that newly discovered impeaching evidence may properly form the basis for granting a motion for new trial, if the evidence is such that a jury *might* have a reasonable doubt of defendant's guilt upon consideration of the newly discovered evidence.

In a case where the newly discovered evidence was "merely impeaching," the court held that a motion for new trial should have been granted. *Ingram* v. *Peyton*, 367 F.2d 933, 936-37 (4 Cir. 1966). The court held:

> "After-discovered evidence, which is merely impeaching, cumulative or corroborating will not ordinarily invalidate a verdict, but if such evidence is of a character to raise a substantial likelihood that it would have affected the result if known at the trial, its nondisclosure cannot be ignored."

Other cases granting a new trial, even though the newly discovered evidence was of an impeaching nature, include: *United States* v. *Miller*, 411 F.2d 825, 831-32 (2 Cir. 1969) (test is whether the newly discovered impeaching evidence could have induced in the jury a reasonable doubt to avoid conviction); *Coates* v. *United States*, 174 F.2d 959, 960 (D.C. Cir. 1949) (test is whether newly discovered impeaching evidence might very well have raised a reasonable doubt with the jury as to defendant's guilt); *United*

States v. *Gordon*, 246 F.Supp. 522 (D.C. 1965); *Hawkins* v. *United States*, 324 F.2d 873 (5 Cir. 1963); *Arbuckle* v. *United States*, 146 F.2d 657, 659-60 (D.C. Cir. 1944).

It is important to remember that the test is not whether the newly discovered evidence would raise in the judge's own mind a doubt as to defendant's guilt:

> "[I]t is not the function of a trial judge to decide finally what the verdict should be, but simply to determine whether the newly discovered evidence should be submitted to a new jury. So, if the trial judge feels that the newly discovered evidence might well result in a different verdict . . . it is his duty 'in the interest of justice' to grant a new trial." *United States* v. *Mitchell*, 29 F.R.D. 157, 159 (D.N.J. 1962) (new trial granted).

In *Mejia* v. *United States*, 291 F.2d 198, 200-01 (9 Cir. 1961), defendant had made certain admissions, but at trial claimed he had done so falsely in order to look like a "big shot." He gave uncorroborated alibi testimony, and was convicted. Subsequently defendant moved for a new trial, claiming the new discovery of a disinterested witness to corroborate his alibi. The trial court denied the motion, saying the jury could not possibly reach a different verdict in view of defendant's admissions. The court of appeals reversed, stating: "[It is] too dogmatic to say that the jury could not . . . regard the . . . [newly discovered evidence] as sufficient to raise a reasonable doubt notwithstanding the admissions made by the appellant." *Id.* at 201.

Petitioner submits that such standards as set forth above are constitutionally required, in that the more stringent standard applied by the Seventh Circuit in the instant case —*i.e.*, "that the evidence would probably produce a dif-

ferent verdict" (App. A, p. 20)—violates the mandate that a conviction must be supported by evidence beyond a reasonable doubt. *In re Winship*, 397 U.S. 358. The problem with the standard applied by the trial court and court of appeals in the case at bar is that it permits a conviction to stand even though it has not been established, beyond a reasonable doubt, that petitioner would still have been convicted, had the newly discovered evidence been presented to the jury. Hence such standard permits affirmance of a conviction even where the totality of the evidence known to the trial court—*i.e.*, the evidence presented at trial, together with the newly discovered evidence—is such that there may exist a reasonable doubt as to petitioner's guilt.

Certiorari should be granted so that this Court may reconsider the standards applicable to disposition of motions for new trial on the basis of newly discovered evidence in the light of *In Re Winship*, 397 U.S. 358. And applying a "reasonable doubt" standard to decision upon the motion in the case at bar,[19] a new trial must be held. It is impossible to state from this record that the jury might not have had a reasonable doubt of petitioner's guilt, had they had the opportunity to consider the newly discovered evidence together with the evidence presented at trial.

In sum, we submit that a new trial should be granted in the interest of justice. It is important to remember that petitioner could not know before trial that the witness would describe him as clean shaven. Attorney Lascaro had

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[19] Application of a reasonable doubt standard would not impose an undue burden on the courts. See *Chapman* v. *California*, 386 U.S. 18, 24-25.

reason to see and be with petitioner in court on June 17, 1971 (R. 44); and therefore he had an opportunity to observe and describe petitioner's "fully-grown" mustache on that date, one week after June 10, 1971, when he was supposedly clean shaven.

Considering the length of deliberations in this day and a half trial, it is reasonable to state that the jury might have reached a different verdict, had the additional evidence been considered.

CONCLUSION

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, and that for any or all of the foregoing reasons, his conviction be reversed, or reversed and remanded.

Respectfully submitted,

JULIUS LUCIUS ECHELES
CAROLYN JAFFE
Attorneys for Petitioner

APPENDIX

APPENDIX A

In the United States Court of Appeals For the Seventh Circuit

No. 72-1988

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JAMES V. PACENTE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois
Eastern Division.

72 CR 241

BERNARD M. DECKER, *Judge.*

ARGUED *en banc* APRIL 10, 1974
DECIDED AUGUST 6, 1974

Before SWYGERT, *Chief Judge,* FAIRCHILD, CUMMINGS, PELL, STEVENS and SPRECHER, *Circuit Judges.*

FAIRCHILD, *Circuit Judge.* Defendant Pacente appealed from convictions of extortion under 18 U.S.C. §1951, and of a false material declaration before a grand jury, under §1623. A panel of this court reversed and remanded for a new trial. *United States* v. *Pacente,* 490 F.2d 661 (7th Cir., 1973). Pursuant to the government's suggestion, we reheard the appeal *en banc.*

Defendant, a Chicago police officer, was indicted on two counts. The first charged the extortion of $200 from Kovacevic, a liquor store owner. The second charged that defendant made a materially false declaration to the grand jury in denying that he had ever received a certain $200 check, and alleged that he had in fact received it at the time of the alleged extortion. Before trial, defendant moved that the court require the government to elect on which count to proceed, or alternatively, order separate trials.[1] The district court denied this motion.[2] Defendant does not appear to have renewed the motion during the course of the trial, although he did unsuccessfully raise the issue in his motion after verdict.

The government's evidence is summarized in 490 F.2d 662-63 and requires only brief description here. Kovacevic, owner of Chicago-Oak Liquors, testified that on June 10, 1971, defendant entered his store and accused him of having sold liquor to a minor. Defendant informed Kova-

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[1] The basis for the motion was "[t]he joinder of the two counts in this Indictment would prejudice the Defendant and that his appearance before the Grand Jury investigating the instant cause might lead to an improper conclusion, and would, therefore, confuse and mislead the jury and prejudice the jury against the Defendant."

[2] In a memorandum opinion and order, the district court stated that the counts were properly joined under Rule 8(a), F.R.Cr.P., because "the indictment charging perjury relates to the circumstances alleged in the extortion count." Regarding discretionary severance, the court noted that the allegation of prejudice was highly speculative; that the government would have "to prove essentially the same facts in two separate trials if a severance were granted. See *United States* v. *Sweig*, 316 F.Supp. 1148, 1158 (S.D.N.Y., 1970)"; and concluded "joinder is not likely to be unfair to the defendant, but rather would put an undue burden on the Government."

cevic that he would be arrested, and then asked, "How much money can you give me?" After negotiations, Kovacevic gave defendant a check for $200 payable to cash; no arrest occurred. The parties stipulated that, before the grand jury, the prosecutor had shown defendant a $200 Chicago-Oak Liquors check, dated June 10, 1971, signed by Kovacevic and payable to cash. Defendant then denied receiving the check.

I.

Defendant argues that the indictment misjoins the extortion and false declaration counts contrary to Rule 8(a), F.R.Cr.P., and, even if a joint indictment is permissible, that Rule 14 requires separate trials.

Rule 8(a) provides:

> "Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

As stated by the panel, both offenses are " 'based on the same act or transaction': Pacente's taking of the $200 from Kovacevic"[3] and both require substantially the same proof. See *United States* v. *Sweig*, 441 F.2d 114, 118-19 (2d Cir., 1971), *cert. denied*, 403 U.S. 932. We conclude, as did the panel, that Rule 8(a) permitted joinder.

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[3] 490 F.2d at 663.

Rule 14, F.R.Cr.P., provides in part:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."[4]

The grant or denial of severance or separate trials under Rule 14 is discretionary. See, e.g., *United States* v. *Kahn*, 381 F.2d 824, 841 (7th Cir., 1967), *cert. denied* 389 U.S. 1015; *United States* v. *Quinn*, 365 F.2d 256, 267 (7th Cir. 1966). Denial of relief will produce reversal only if abuse of discretion is shown. *United States* v. *Rogers*, 475 F.2d 821, 828 (7th Cir., 1973).

Review of the exercise of this discretion must be based on the state of the record at the time of the motion. *Rogers, supra.*

In *United States* v. *Sweig*, 316 F.Supp. 1148 (S.D. N.Y., 1970), aff'd 441 F.2d 114 (2d Cir., 1971), *cert. denied* 403 U.S. 932, Sweig and Voloshen were indicted for conspiracy to defraud the United States, and a number of overt acts were alleged. A number of other counts charged one or the other defendant with perjury in testimony before the grand jury concerning the transactions charged

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[4] Compare ABA Standards, Joinder and Severance §2.2(b), Approved Draft, 1968. The standard for severance of related offenses, where application is made before trial, is whether "it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each offense." In commentary, it is said: "Whether a severance of related offenses should be granted must remain largely within the discretion of the trial judge upon consideration of the circumstances of the individual case."

as overt acts. Because joint trial of defendants on the conspiracy count was unquestionably permissible, and because substantially all the evidence on the perjury counts could properly be heard in such joint trial for conspiracy even if the perjury counts were absent, the district court denied severance of defendants (and apparently separate trials of the perjury counts), but did so without prejudice to a renewed application later on, noting that "It remains possible, of course, that different things or a different light may appear as the case advances toward or through the trial stage."

Voloshen pleaded guilty. Sweig was convicted and appealed, arguing that the conspiracy and perjury counts should not have been tried together. In affirming, the second circuit noted that Sweig had not taken advantage of the willingness of the district court to reconsider at a later stage and held that under the circumstances, the denial of the motion was not plain error. Evidently the court of appeals deemed it was not an abuse of discretion to deny separate trials where the sole ground of the motion was that one count charged conspiracy and other counts charged perjury before the grand jury with respect to elements of the conspiracy.[5]

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[5] In a similar case the second circuit has interpreted *Sweig* as holding both that commonality of proof of the conspiracy and perjury crimes permitted denial of a Rule 14 pretrial motion for separate trials, and that an appellant who fails to renew his motion on the eve of trial, may not raise the claim on appeal. *United States* v. *Carson*, 464 F.2d 424, 436 (2d Cir., 1972), *cert. denied* 409 U.S. 949. Although our present decision is not based on waiver by failure to renew the pretrial motion, ABA Standards, Joinder and Severance, §2.1(b), Approved Draft, 1968, provides:

> "If a defendant's pretrial motion for severance was overruled, he may renew the motion on the same grounds before or at the close of all the evidence. Severance is waived by failure to renew the motion."

See Commentary, pp. 27-28.

> "To find an abuse of discretion it would be necessary, in effect, to find that the facts and law presented to the trial judge at the time of the motion for severance demonstrated that a trial under joinder was likely to be unfair and that the trial was in fact unfair." *Kahn, supra,* at 841. See also *United States* v. *Blue*, 440 F. 2d 300, 302 (7th Cir., 1971), *cert. denied* 404 U.S. 836.

Defendant's claim of prejudice is based on the supposed effect on the jury's consideration of Count I of information the jury would glean from Count II. One of the allegations of Count I was that defendant obtained $200 from Kovacevic in June, 1971. Count II charged that defendant declared to the grand jury under oath that he never received a $200 Kovacevic check, payable to cash, dated June 10, 1971, and charged that such declaration was false in that he had received such check on June 10. Competent evidence that defendant received the check June 10 would tend to establish an element of both counts. Defendant argues that in considering whether or not defendant received the $200 as charged in Count I, the jury would not only have before it such competent proof, but, in addition, would be aware from Count II (and proof of defendant's grand jury testimony) (1) that defendant had told the grand jury he did not receive the check, and (2) that the grand jury did not believe the defendant. If Count I were tried separately, on the other hand, the jurors would be unaware of (1) and (2).[6]

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[6] The government does argue at least the possibility that it could prove (1) as a false exculpatory statement and that if defendant were to present testimony as to reputation, as happened here, the government could inquire whether the witness knew of Count II, and thus make the jurors aware of (2).

It is claimed that the jury's awareness of (1) and (2) was prejudicial to fair consideration of Count I because the grand jury's disbelief of defendant's denial would discredit defendant's denial at trial if he chose to testify, and would in any event tend to make the proof against him seem more persuasive.

The view which the trial jury ought to take is that each count is a mere accusation. Although the issue concerning receipt of the $200 check was central to each count, proof on that issue was to be weighed and the issue resolved according to the instructions of the court, and not differently by reason of the presence of two accusations as to both of which the issue was significant. In order to find merit in defendant's position, we would have to assume that the trial jurors will treat Count II not merely as a formal accusation of a false declaration, but as a pronouncement, worthy of respect, of an opinion concerning Count I. Trial jurors may in fact know what a grand jury is and how it functions. A trial juror may or may not realize that the standard of certainty required of a grand jury is probable cause to believe that a defendant has committed an offense, and may believe that a grand juror will not vote to indict for a false statement unless personally convinced that the witness lied. Conceivably a trial juror may be influenced in deciding to believe a witness' testimony by the fact that the grand jurors heard the same testimony and did not believe it.[7]

These things are all conceivable, but it is the judgment of a majority of this court that it is an unwarranted overrefinement to speculate that they present a significant

[7] At trial in a single count, a juror may conceivably, though improperly, give some weight to a belief that a number of grand jurors have already decided the same issue.

danger that the trial jurors, acting together, will give weight to the conclusion reached by the grand jurors and fail to decide the issues of fact according to their own proper evaluation of the evidence.[7a]

Jurors are ordinarily, and were in this case, fortified in viewing the indictment as mere accusation, by instructions from the court. They were told:

> "The indictment that I am going to refer to in a few moments is not evidence of the defendant's guilt, it is simply, as I told you before [presumably on voir dire], the manner by which the government accuses a person of a crime, and you should not be prejudice[d] against a defendant because an indictment has been returned against him. . . .
>
> "You are instructed to consider the testimony given by the defendant Pacente before the Grand Jury on February 22nd only as evidence under Count 2 of the indictment and you should not consider it as evidence on any other count in the indictment. . . .
>
> "Now, there are two counts in this indictment, and, as I have told you, each one charges a separate crime. You should consider each one separately. The defendant's guilt or innocence of the crime charged in one count should not affect your verdict on the other count. . . ."

We think these instructions were a meaningful protection against the possibility that the trial jurors would give weight, in considering whether to convict on Count I, to the determinations the grand jurors made in indicting on Count II. The feared reaction is not so natural,

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[7a] The rationale of the panel's earlier decision in *Pacente* was rejected. *U.S.* v. *Isaacs*, 493 F.2d 1124, 1159-60, 1167 (dissenting opinion), 1169 (dissenting opinion on petition for rehearing), (7th Cir., 1974), *cert. den.* 42 L.W. 3687 (June 17, 1974).

instinctive, or compelling as the one which caused the Supreme Court to reject as inadequate protection the instruction to disregard as to one defendant the incriminatory portion of another defendant's admissions involved in *Bruton* v. *United States,* 391 U.S. 123. (1968).

"Our theory of trial relies upon the ability of a jury to follow instructions." *Opper* v. *United States,* 348 U.S. 84, 95 (1954). "Of course, curative instructions are no panacea, . . . but our jurisprudential system assumes, at least to some extent, that juries are able to grasp the fundamental distinction between allegations in an indictment and evidence pointing toward guilt." *Dallago* v. *United States,* 427 F.2d 546, 552, fn. 13 (D.C. Cir., 1969).

United States v. *Grady,* 185 F.2d 273 (7th Cir., 1950) and *United States* v. *Douglas,* 155 F.2d 894 (7th Cir., 1946), relied on by defendant, are inapposite. In those cases, affidavits attesting to facts supporting the charges in the criminal informations were sent to the jury along with the information. We reversed because the defendant was deprived of the right to confront the affiants.

In *Douglas, supra,* at 895-96, the court observed: "No complaint is made because the information was permitted to go to the jury, but the criticism is directed solely at the affidavits. It is one think to send to the jury an indictment or information, the accusation against the defendant, but something entirely different to send affidavits containing the government's proof in support of such accusation." See also *Grady, supra,* at 275. The grand jurors who voted Count II are analogous to the unconfronted affiants in *Grady* and *Douglas* only if it is assumed that the petit jury treats Count II as evidence with respect to Count I.

Defendant suggests that prejudice was inevitable at a joint trial because of a factor unique to this case: At the time of the alleged false declaration, Rule 51 of the Chicago Police Department prohibited an officer's refusal to testify, on grounds of self-incrimination, before a grand jury. This court recently held Rule 51 unconstitutional "to the extent that it denies police officers the privilege against self-incrimination where criminal prosecution may follow." *Confederation of Police* v. *Conlisk*, 489 F.2d 891, 895 (7th Cir., 1973), *cert. denied sub nom. Rochford* v. *Confederation of Police*, 42 L.W. 3594 (April 22, 1974). When defendant appeared before the grand jury, however, his choice appeared to be either to relinquish the 5th amendment privilege or risk the loss of his employment. He contends that the false declaration charge was a product of that dilemma. In his view, it was unfair to require him simultaneously to defend both the extortion and false declaration counts based on his coerced denial of the facts underlying the extortion.

We are unable to agree with this analysis. First, the pressures to which the rule subjected a policeman-witness at grand jury proceedings have little bearing on the propriety of a joint trial on the resulting charges. In essence, defendant's argument is that the rule made it unfair to question him before the grand jury and indict him for a false answer. If the argument were accepted, the relief should be dismissal of Count II, not separate trials.

Despite, however, the threat of discharge implicit in the department rule, the false declaration count was not improper. Before the grand jury, defendant could have invoked the privilege against self-incrimination, and refused to answer regarding receipt of the $200 check. In that event,

despite the rule, the department could not lawfully have discharged him for his insistence on the privilege. *Gardner* v. *Broderick*, 392 U.S. 273 (1968); *Sanitation Men Ass'n, Inc.* v. *Sanitation Comm'r*, 392 U.S. 280 (1968). This was the court's holding in *Confederation of Police* v. *Conlisk*, *supra*. On the other hand, defendant could, as he did, waive the privilege and answer. In that event, his testimony regarding past conduct could not be used against him in a criminal proceeding involving such conduct. *Garrity* v. *New Jersey*, 385 U.S. 493 (1967). The compulsion of the rule does not, however, justify a witness in testifying falsely. "In short, while a public employee may not be put to the Hobson's Choice of self-incrimination or unemployment, he is not privileged to resort to the third alternative, *i.e.*, lying." *United States ex rel. Annunziato* v. *Deegan*, 440 F.2d 304, 306 (2d Cir., 1971). Whether defendant's denials of wrong-doing were true or false was for the petit jury to decide. Nothing, however, about Police Department Rule 51 precluded prosecution for false declarations. See discussion *U.S.* v. *Devitt*, ... F.2d ..... (7th Cir., 73-1691, July 2, 1974), slip opinion pp. 8-11.

For these reasons, we conclude that the district court was within its discretion in deciding that the probability of prejudice at a single trial on both offenses was too speculative to require severance. The factors available to the court at the pretrial motion stage did not dictate a contrary result, and nothing emerged during the trial to refute the initial ruling. In light of this, the court was correct in endeavoring "to balance possible prejudice to the defendant from joinder with the public interest in efficient use of judicial time through joint trial of defendants and offenses which are connected." *United States*

v. *Rogers, supra,* at 828.[8] The district court did not abuse its discretion in denying the motion for separate trials under Rule 14.

II.

Defendant asserts four additional arguments for the reversal of his convictions. The panel which first heard the appeal found it unnecessary to reach these contentions, but in view of our different conclusion on the matter of separate trials, the other points must now be considered.

A. *Effect on interstate commerce.*

Defendant argues that there was no proof that the extortion obstructed, delayed, or affected interstate commerce.[9]

At trial, the parties stipulated to the facts pertinent to this contention: During 1971, Chicago-Oak Liquors (Kovacevic) purchased beer and liquor on a regular basis from distributors located in Chicago. These distributors obtained their beer and liquor from sources outside Illinois.

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[8] See *United States* v. *Teemer,* 214 F.Supp. 952, 954 (N.D.W.Va., 1963):

> "The exercise of the [Rule 14] discretion involves consideration balancing possible prejudice to the defendants in the trial of the several offenses in one trial against the inconvenience and expense to the Government, the court and the jurors of holding separate trials where so many factual and legal issues are in common."

[9] 18 U.S.C. §1951(a) provides penalties for one who "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do. . . ."

Section 1951(b) (3), quoted in the text, *infra,* defines commerce as used in section 1951 so as to include interstate commerce.

Defendant's argument that the goods had come to rest in Chicago and that the sales from the distributors to Chicago-Oak Liquors were purely intrastate transactions has been disposed of in *United States* v. *DeMet*, 486 F.2d 816, 821-22 (7th Cir., 1973), *cert. denied*, 42 L.W. 3610 (April 29, 1974). The facts were sufficiently similar to those in the present case. The court observed:

> "Although [the tavern-owner's] business was primarily local, depletion of [his] assets by the goods and money extorted, or the cessation of his business if he did not yield and his fears were realized, would tend to reduce the demand for an amount of beer and liquor moving into Illinois. The effect on interstate commerce would exist, though small by most standards, and only indirectly caused by defendant's acts.
>
> * * *
>
> "Where the victim of extortion, as here, customarily obtains inventory which has come from outside the state, obstruction and delay of, and effect upon commerce may, for the purpose of the Hobbs Act, be found in curtailment of the victim's potential as a buyer of such goods. This may be traced either through the depletion of his assets by his fulfillment of the extortionate demands or the harm which would follow if the threats were carried out." [10]

Defendant also argues that an inadvertent omission from instructions on the effect on commerce, though not challenged at the appropriate time, is reversible error.

18 U.S.C. §1951(b)(2) defines "commerce" for Hobbs Act purposes as:

> "Commerce within the District of Columbia, or any territory or possession of the United States; *all commerce between any point in a state, territory, posses-*

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[10] See also *United States* v. *Gill*, 490 F.2d 233, 236-7 (7th Cir., 1973) *cert. denied* 42 L.W. 3687, June 17, 1974.

> *sion or the District of Columbia, and any point outside thereof;;* all commerce between points within the same state through any place outside such state, and all other commerce over which the United States has jurisdiction." (Italics ours.)

The italicized second element of the definition is the element most specifically germane to the evidence in this case. It seems quite clear that the court intended to read the second element, either alone or followd by the third and fourth elements. Inadvertently the court skipped to the third element and instructed only:

> "And the term 'commerce' means all commerce between points within the same state through any place outside such state and all other commerce over which the United States has jurisdiction."

Standing alone, the statement is literally correct, but not very helpful in this particular case. No one called the matter to the court's attention. Although the court did not ask for objections at the close of the instructions, under Rule 30, F.R.Cr.P., there was an adequate opportunity at a short colloquy about other matters immediately after the jury retired.

In the context of the entire record we do not consider the omission "basic and highly prejudicial error." Cf. *United States* v. *Esquer*, 459 F.2d 431, 435 (7th Cir., 1972), *cert. denied* 415 U.S. 1006; *United States* v. *Malasano*, 472 F.2d 642, 644 (7th Cir., 1973); *United States* v. *Cantu*, 7th Cir., No. 71-1277, Oct. 6, 1972, slip op. pp. 3-4. Rule 30, F.R.Cr.P. It must have been clear to all that commerce between Illinois and other states was being referred to.[11]

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[11] Cf. *Gill, supra*, fn. 10, pp. 237-8.

In an opening statement government counsel acknowledged that the government must show that the alleged extortion "in some way affected interstate commerce" and said there would be stipulated evidence to show that Kovacevic bought beverages from local distributors who had bought them from sources outside Illinois. The parties stipulated that three representatives of distributors in Chicago would testify, if called, that he sold merchandise to Kovacevic which had been bought from a number of persons at specified locations outside Illinois.

In final argument government counsel said it is clear that Kovacevic dealt in products that came from outside Illinois, and that the extortion affected interstate commerce. In response defense counsel referred to the stipulated testimony and asked whether there wasn't a reasonable doubt whether taking $200 away from the tavern owner "interfered with interstate commerce."

During the instructions, the court reviewed the indictment, and mentioned the allegation that articles "manufactured in various states other than Illinois were purchased and to be purchased." The court said at another point that the government need not prove that a particular shipment from out of state was obstructed or delayed, and referred to "the depletion of the [re]sources of the business engaged in interstate commerce."

B. *Instruction as to separate consideration of counts.*

The district court instructed:

> "Now, there are two counts in this indictment, and, as I have told you, each one charges a separate crime. You should consider each one separately. The defendant's guilt or innocence of the crime charged in one count should not affect your verdict on the other

> count and *if you find the defendant guilty beyond a reasonable doubt of either of the crimes charged in the indictment, then a verdict of guilty should be returned.*" (Italics ours.)

Defendant suggests that the italicized portion is open to the construction that if the jury found defendant guilty of only one count, it should return a general verdict of guilty. Such a construction is not a necessary one, and would be inconsistent with the preceding portion of the same sentence. Moreover, the court furnished three forms of verdict, one for a verdict of guilty on both counts, one for not guilty on both, and one for guilty on one (with the number to be inserted) and not guilty on the other. These forms were read and their use explained. The jury could not reasonably have understood the instruction as suggested by defendant.

C. *Excuse of Juror During Deliberations.*

Defendant contends that an incident during the jury's deliberations deprived him of his 6th amendment right to a jury trial. After selecting 12 jurors, but prior to the opening of testimony, counsel had signed and filed an agreement stating:

> "It is hereby stipulated by and between the parties hereto by their respective attorneys that in case one but not more than two jurors shall be excused from the panel by reason of illness or for any other good cause as determined by the Court, that the trial may proceed before the remaining members of the panel with the same force and effect as if a full panel were present."

The 12 jurors heard the evidence, received their instructions, and retired to consider their verdict. Sometime during the first evening of deliberations, the marshal re-

ceived a call from the husband of juror Woodson informing him that Mrs. Woodson's father was seriously ill and not expected to live. The marshal transmitted this information to the district judge. The judge, without consulting counsel, excused Mrs. Woodson.

Defendant argues that the stipulation was not binding because, although signed by his counsel, there is nothing in the record indicating the defendant himself agreed to it. Rule 23(b), F.R.Cr.P., provides: "Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12."

Nothing in Rule 23(b) suggests that counsel's signature on a stipulation for a reduced size of jury does not bind the party he represents if the record fails to show that the party authorized counsel to stipulate. During the progress of a trial, it is ordinarily presumed that an attorney of record has authority to bind the party he represents as to matters of procedure. 7 Am. Jur. 2d 120, Attorneys at Law §121. Although policy considerations may cause courts to forego reliance on that presumption as the matter stipulated rises in stature, the Supreme Court has "squarely rejected the argument that . . . any waiver of constitutional rights [is] ineffective unless deliberately made and expressly approved by the defendant." *United States ex rel. Allum* v. *Twomey*, 484 F.2d 740, 745 (7th Cir., 1973).

Absence of recorded personal expression by defendant of consent to reduction in size of a jury has been held not to be a ground of collateral attack. *Horne* v. *United States*, 264 F.2d 40, 41-43 (5th Cir., 1959), *cert. denied* 360 U.S. 934; *Williams* v. *United States*, 332 F.2d 36, 38 (7th Cir., 1964), *cert. denied* 379 U.S. 976 (1965). Agree-

ment by counsel has been held sufficient on direct appeal. *Beatty* v. *United States*, 377 F.2d 181, 185 (5th Cir., 1967). Cf. *United States* v. *Vega*, 447 F.2d 698, 700 (2d Cir., 1971) where the record also showed that counsel had conferred with his client.

The record before us does not show a colloquy in the presence of defendant at the time the stipulation was signed by his counsel and filed, the first day of trial. It does show a colloquy in open court the morning after the juror had been excused pursuant to the stipulation and while the jury continued to deliberate. The judge announced the facts concerning the excused juror. Defense counsel objected "notwithstanding the stipulation" on the ground he had not been notified. Defendant said nothing. The judge later indicated a plan to let the jury deliberate until about 11 a.m., give a modified Allen instruction, let the jury deliberate until noon, and then discharge it if no verdict had been reached. Defense counsel then said: "My defendant's and my suggestion, your Honor, just to leave them wait. We would object to any Allen Charge and I will object to them being discharged, your Honor." Defendant remained silent. We conclude that defendant is not in a position to repudiate his attorney's authority to agree to reduction in the size of the jury.

Defendant asserts three additional objections to juror Woodson's being excused. First, he contends that the illness of the juror's father did not fall within the terms of the stipulation permitting excuse "by reason of illness or for any other good cause as determined by the court." We think that the district judge acted within the discretion conferred by the stipulation in determining that the event constituted good cause. Cf. *Rogers* v. *United*

States, 319 F.2d 5, 7 (7th Cir., 1963), *cert. denied*, 375 U.S. 989 (1964) (snowbound juror); *United States* v. *Houlihan*, 332 F.2d 8, 12-13 (2d Cir., 1964), *cert. denied* 379 U.S. 828 (nurse-juror excused due to illness of patient).

Second, defendant argues that the stipulation only authorized release of a juror during the receipt of evidence, not after the jury retired to deliberate. The stipulation, however, contains no such limitation, and the language of Rule 23(b) permitting stipulation "any time before verdict" clearly requires none.

Finally, defendant argues that the district court should have notified defense counsel before excusing Mrs. Woodson. The second circuit rejected a similar contention in *United States* v. *Houlihan, supra*, at 13:

> "Although every effort should be made to afford such an opportunity, we do not think that failure to do so [*i.e.*, notify counsel before relieving a juror] in a case such as this presents grounds for reversal. Situations may sometimes arise when a respect for the rights of jurors will require the judge to take immediate action without consulting counsel—*e.g.*, if a juror is taken so ill that he cannot come to court or has a family emergency requiring him to leave during the night or over a weekend."

Defendant asserts that, had the court consulted his counsel, he would have insisted on verifying the illness of Mrs. Woodson's father. However, the parties had stipulated that the court would determine what constituted good cause. We think notice was not essential to the exercise of the function described. See *United States* v. *Vega, supra; United States* v. *Ricks*, 475 F.2d 1326 (D.C. Cir., 1973).

D. *Denial of motion for new trial on ground of newly discovered evidence.*

At trial Kovacevic identified defendant as the man who was in his store in April and June, 1971, and with whom he had the transaction involving the $200 check. On cross-examination, he was asked, among other matters of the man's appearance, whether he had a moustache. Kovacevic answered "No". Defendant's wife, sister-in-law, and barber testified that defendant had a full moustache at the time of the alleged extortion. Defendant produced a photograph in which he appeared with a moustache and which he said was taken in February, 1971.

Defendant's motion for new trial was supported by the affidavit of Lascaro. Lascaro stated that he was an attorney; that he had appeared in court on June 17, 1971 representing a client arrested by defendant; that defendant was also present and had a moustache.

In denying the motion, the district judge (who, of course, had seen and heard the witnesses) indicated that he regarded the Lascaro testimony as cumulative, and unlikely to change the result since a witness could be mistaken as to a matter like a moustache and still make a correct identification. Two of the propositions which must be established in support of a motion for new trial because of newly discovered evidence are that the evidence would probably produce a different verdict and is not merely cumulative. Grant or denial of the motion is discretionary. *United States* v. *Curran*, 465 F.2d 260, 264 (7th Cir., 1972). We find no abuse of discretion here.

The judgment appealed from is affirmed.

SWYGERT, *Chief Judge*, dissenting. I dissent and adopt as the basis for my dissent the opinion of the majority of the division of court which originally heard and decided this appeal. That opinion is reported at 490 F.2d 661 (7th Cir. 1973).

SPRECHER, *Circuit Judge*, dissenting. I dissent on the basis that I believe that the district court abused its discretion under the facts of this case—that is, by trying together a single substantive count and a single perjury count involving receipt of the same $200 check, with each count tracking the other with a double-teaming effect. Whether discretion is abused must be separately decided in each case, but I would find abuse here.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1973—SEPTEMBER SESSION, 1973

No. 72-1988

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JAMES V. PACENTE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 72 CR 241
BERNARD M. DECKER, *Judge.*

ARGUED DECEMBER 5, 1973—DECIDED DECEMBER 28, 1973

Before SWYGERT, *Chief Judge,* SPRECHER, *Circuit Judge,* and POOS, *Senior District Judge.**

SWYGERT, *Chief Judge.* James Pacente, a veteran Chicago police officer, was indicted on two counts: extorting money from Stojan Kovacevic, the owner of Chicago-Oak Liquors, a combination liquor store and tavern, in viola-

* Senior District Judge Omer Poos of the Southern District of Illinois is sitting by designation.

tion of the Hobbs Act, 18 U.S.C. § 1951; and making a false declaration before the grand jury in violation of 18 U.S.C. § 1623. Pacente was convicted after a jury trial and sentenced to concurrent terms of three years on each count. He has appealed and we reverse.

According to the evidence most favorable to the Government, Pacente solicited money from Kovacevic to prevent the latter from being arrested for having sold liquor to a minor. After making several offers of cash which were rejected by Pacente, Kovacevic wrote a check in the amount of $200 which was made out to cash and dated June 10, 1971. Subsequently, the check was cashed without endorsement at a tavern located near Pacente's home. The tavern owner testified that Pacente did not cash the check although he was unable to remember who did. That testimony was contradicted by an FBI agent who stated that the owner had told him that a good friend of Pacente's had cashed the check. There was no dispute that other Chicago-Oak Liquors' checks had been cashed at this tavern.

Pacente was called before the Special February 1971 Grand Jury which was investigating possible violations of the Hobbs Act. He testified under oath that he did not receive the check for $200 which was dated June 10, 1971 and signed by Kovacevic. Subsequently, the grand jury returned an indictment in two counts charging extortion and the making of a false declaration. Prior to trial, defense counsel moved to have the Government proceed on only one count of the indictment, or, in the alternative, to sever the counts and provide separate trials for each. The motion was denied without reasons and the case set for trial. The denial of severance was again unsuccessfully raised after the conviction in a motion for a new trial and this appeal followed.

Although defendant raises several issues on appeal, we only focus on the question of whether severance should have been granted.

I

Pacente argues that the extortion and false declaration counts should have been severed as misjoined under Rule 8(b) of the Federal Rules of Criminal Procedure.[1] As the Government correctly points out, Rule 8(a), not Rule 8(b), deals with the joinder of counts in this case. Rule 8(b) pertains to the joinder of defendants and Rule 8(a) to the joinder of offenses. Rule 8(a) provides:

> Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

The two offenses here are "based on the same act or transaction": Pacente's taking of the $200 from Kovacevic. The two offenses are also "connected together" since the false declaration count is based on a denial of having taken the money, a major element of the extortion. Moreover, the same evidence required to prove the extortion was used to prove the false declaration. *See McElroy* v.

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[1] Rule 8(b) provides:

Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

United States, 164 U.S. 76 (1896). In *United States* v. *Sweig*, 441 F.2d 114, 118-19 (2d Cir. 1971), the Second Circuit held, in an appeal similar to the case before us, that a conspiracy count could properly be joined with perjury counts under Rule 8(a) where the same evidence could be used to prove both conspiracy and perjury.

We are not persuaded by Pacente's contention. The counts here were properly joined under Rule 8(a).

II

Pacente next argues that even if joinder was permissible under Rule 8(a), a severance should have been granted pursuant to Rule 14 which provides in relevant part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. . . .

More specifically, defendant argues that he was prejudiced by the joinder of the two counts since the petit jurors were aware that the grand jury found that he had lied when he denied having taken the June 10, 1971 check from Kovacevic.

The Government responds that this case is no different from any other one, "since the existence of the indictment is an obvious indication that the Grand Jury felt that the defendant was guilty" and therefore there was no prejudice to Pacente in trying both counts together. While this observation may have applicability to a multicount indictment on various subsantive charges, we find it to be an over-simplification and inapplicable to the situation before us. It is one thing for the petit jurors to believe that the

grand jury concluded that probable cause existed that the defendant committed the substantive offense. It is quite another thing, however, for the petit jurors to know that the grand jurors—laymen like themselves—believed the defendant to have lied to them. Such knowledge serves to impair a defendant's ability to effectively defend himself on the substantive charge. In the event the defendant testifies concerning the substantive charge, the knowledge of the false declaration count has the effect of informing the petit jurors that the defendant's testimony is not to be believed. Accordingly, the defendant is impeached as soon as he reaches the witness stand. On the other hand, in the event that defendant chooses not to take the stand the substantive offense is substantially reinforced by the addition of the false declaration count.

Additionally, the joinder of the substantive count with the false declaration count tends to shift the burden of proof to the defendant who must prove that he did not lie to the grand jury. The problem, however, is that there is no way to confront and defend against the false declaration count. This dilemma has been recognized by this circuit in the analogous cases of *United States* v. *Douglas*, 155 F.2d 894 (7th Cir. 1946), and *United States* v. *Grady*, 185 F.2d 272 (7th Cir. 1950). In those cases the defendants were tried on informations which had attached thereto affidavits containing evidence against the defendants in the one case, and a statement that the charge made and the information was true in the other case. Judge Major, writing for the court in both cases, held that submission of the affidavits to the jury was prejudicial to the defendants because the defendants had no effective means of confronting the allegations contained therein. The defendants there had no opportunity to meet the *ex parte* hearsay allegations in the affidavits to the effect that

the charges contained in the information were true. The conclusion of the affiant that the substantive charges were true was thought to interfere with the petit jurors' ability to assess independently the evidence pertaining to the substantive charges when the affiant was not before them.

The prejudice which inured to the defendant here is further demonstrated by reference to a situation where the Government attempts to introduce at the trial of a defendant charged with a substantive offense only, evidence that defendant had also been indicted for perjury in connection with the same substantive charge. The evidence of the mere fact of indictment, however, would clearly be inadmissible because of the resulting prejudice to the defendant. IIIA WIGMORE ON EVIDENCE, § 980a (Chadbourn Rev. 1970).

This case is further complicated by the fact that the defendant, as a Chicago police officer, was subject to a rule of the Chicago Police Department under which he could be suspended or discharged for failing to testify before the grand jury. Accordingly, Pacente was faced with the prospect of either forfeiting his job or risking self-incrimination. This dilemma was recently recognized by this court in *Confederation of Police* v. *Conlisk*, No. 73-1543 (7th Cir., Nov. 29, 1973). In that case the constitutional validity of the rule was struck down as depriving Chicago police officers the privilege against self-incrimination when a criminal proceeding might follow.

In support of its proposition that there is no prejudice in trying a substantive count with a false declaration count, the Government relies heavily on *United States* v. *Sweig*, 441 F.2d 114 (2d Cir. 1971). Sweig was jointly indicted with a codefendant who plead guilty before trial. Sweig

argued on appeal that the joinder of the conspiracy charge with the multiple perjury charges was in violation of Rule 14. The *Sweig* case, however, is distinguishable from the one before us in three different respects. First, Sweig's motion for severance under Rule 14 was based on the same proposition that he raised, arguing misjoinder under Rule 8(a): conspiracy and perjury are distinct offenses that should not be tried together. This argument was not directed to prejudice, but only to misjoinder of counts. In motions under Rule 8 the court must determine whether defendants or offenses may be joined. When joinder is improper, severance is the appropriate remedy and there is no discretion in the court's ruling. If, however, joinder is proper and severance is requested under Rule 14, then the court must determine whether there is prejudice to either the defendant or the Government by the joinder. In that event, severance is required. This, however, is a discretional matter with the trial court which can be reversed only for abuse of discretion.[2]

Second, the trial judge in *Sweig*, in denying the pretrial motion fo rseverance, expresse dhis willingness to reconsider the question of severance at a later time, but the issue was never raised again and the court of appeals treated the claim as being waived.

Third, it appears that in *Sweig* the court never considered the question before us: whether knowledge of the petit jurors that the grand jurors found that the defendant had lied prejudiced him and required reversal.

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[2] There is agreement between defendant and the Government as to the application of the abuse of discretion standard here. *United States* v. *Kahn*, 381 F.2d 824, 841 (7th Cir.), *cert. denied*, 389 U.S. 1015 (1967); *United States* v. *Quinn*, 365 F.2d 256, 267 (7th Cir. 1966).

That court was concerned with "possible prejudice resulting from the admission of the tangential hearsay declarations against the relevance of Sweig's participation in conspiracy to his motive to lie before the Grand Jury." *Id.* at p. 119.

We are not persuaded by the Government's position that the court's limiting instruction cured the prejudice that might have resulted by trying the two counts together. The instruction which the Government makes reference to reads as follows:

> You are instructed to consider the testimony given by the defendant Pacente before the Grand Jury on February 22nd only as evidence under Count 2 of the indictment and you should not consider it as evidence on any other count in the indictment.

The court also instructed the jury not to consider the indictment itself as evidence of guilt, nor to be prejudiced against the defendant merely because an indictment had been returned against him.

A vital question is whether a limiting instruction such as the one here in the context of this case can erase the slate once it is written upon. The court must depend on the jury not to rely on the false declaration indictment and the defendant's grand jury testimony, both of which would have been inadmissible as evidence if there had been separate trials on each count as we have noted above. Justice Frankfurter set forth a strong argument against the use of limiting instructions in his dissent in *Delli Paoli* v. *United States*, 352 U.S. 232, 247 (1957). The majority in that case upheld the admission of a codefendant's confession to be used solely against the codefendant. The Court held that Delli Paoli was protected by the court's limiting

instruction to the jury that the confession be considered only as to the codefendant. We think that Justice Frankfurter's dissent is also applicable to the limiting instruction here.

> One of the most recurring of the difficulties [in observing the rules of evidence admissible against some but not all defendants] pertains to incriminating declarations by one or more of the defendants that are not admissible against others. The dilemma is usually resolved by admitting such evidence against the declarant but cautioning the jury against its use in determining the guilt of the others. The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell. While enforcing declarant and admonishing the jury not to consider it against other defendants, Judge Learned Hand, in a series of cases, has recognized the psychological feat that this solution of the dilemma demands of juries. He thus stated the problem:
>
> > "In effect, however, the rule probably furthers, rather than impedes, the search for truth, and this perhaps excuses the device which satisfies form while it violates substance; this is, the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's." *Nash* v. *United States*, 54 F.2d 1006, 1007. 352 U.S. at 247.

This position taken by Justice Frankfurter and joined by Justices Black, Douglas, and Brennan later became the law when *Delli Paoli* was overruled by the Supreme Court

in *Bruton* v. *United States*, 391 U.S. 123, 126 (1968). As Justice Jackson said in his concurring opinion in *Krulewitch* v. *United States*, 336 U.S. 440, 453 (1949), "The naive assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigated fiction."

The use of limiting instructions as a means to avoid severance has had many critics.[3] The criticism is summed up in *Barton* v. *United States*, 263 F.2d 894, 898 (5th Cir. 1959), in which the Fifth Circuit reversed a conviction for failure to grant a severance even though a limiting instruction was given. The court doubted whether the jury could carry out the instruction since "[t]o do so would require twelve minds more perfectly disciplined than those of the average human jurors."

In view of the foregoing, we need not consider the other issues in this appeal.

The judgment of conviction is reversed and the case is remanded for a new trial.

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[3] Note, *Joint and Single Trials under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, 74 Yale L. J. 553, 554-56 (1965).